

The Electricity Excise Tax is imposed upon the privilege of using electricity in Illinois which is purchased for use or consumption and not for resale, other than by municipal corporations owning and operating a local transportation system for public service.

May 6, 1999

Dear COMPANY:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see enclosed), is in response to your representative's letter of March 11, 1999. Review of that request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of the enclosed copy of Section 1200.110 appears to be contained in that request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither the COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter you have stated and made inquiry as follows:

COMPANY, through its attorneys, requests a Private Letter Ruling from the Illinois Department of Revenue ("Department") pursuant to Title 2, Part 1200, of the Illinois Administrative Code. The ruling is requested on behalf of COMPANY and its rail carrier subsidiaries in Illinois, including BUSINESS. The Department is requested to rule that neither COMPANY nor its rail carrier subsidiaries using or consuming electricity in Illinois are subject to tax under the Electricity Excise Tax Law (35 ILCS 640/2-1 *et seq.*) ("EETA").

The ruling is requested to be effective as of the commencement of the EETA, August 1, 1998, and to remain in effect for so long as the statutes and facts upon which the ruling are based remain substantively unchanged.

#### **Statement of the Facts**

COMPANY was established by Congress in 1971 pursuant to the Rail Passenger Service Act, formerly 45 U.S.C. §§ 501-658, now codified at 49 U.S.C. § 24101 *et seq.* Under that Act, COMPANY is a private, for profit, rail carrier corporation providing rail passenger service throughout the United States. All of COMPANY's preferred stock is held by the United States' Secretary of Transportation. The Board of Directors of COMPANY are appointed by the President of the United States with the advice and consent of the Senate, the Secretary of Transportation as an *ex officio* member.

BUSINESS is a rail carrier subsidiary of COMPANY. BUSINESS is COMPANY's only rail carrier subsidiary in Illinois. COMPANY has owned 100 percent of the stock of BUSINESS since May 1, 1984. BUSINESS is principally engaged in the operation of a train terminal in Chicago.

Congress has exempted COMPANY and all rail carrier subsidiaries of COMPANY "from a tax, fee, head charge, or other charge, imposed or levied by a State, . . . on COMPANY or such subsidiary . . . after September 30, 1981". 49 U.S.C. § 24301(1).

COMPANY and its rail carrier subsidiaries purchase electricity from Illinois electric suppliers for use in their rail carriage business. COMPANY and its rail carrier subsidiaries consume such electricity in Illinois. COMPANY and its rail carrier subsidiaries do not purchase electricity for resale in Illinois.

### **Requested Ruling**

The Department is asked to rule that the federal exemption from state taxes provided in 49 U.S.C. § 24301(l) exempts COMPANY and its rail carrier subsidiaries from the tax imposed by section 2-4 of the EETA (35 ILCS 640/2-4), on the purchase of electricity in Illinois for use and consumption in the state and not for resale. Additionally, the Department is asked to rule that any Illinois entity delivering such electricity to COMPANY or its rail carrier subsidiaries are not required under section 2-7 of the EETA to bill and collect the tax from either COMPANY or its rail carrier subsidiaries and COMPANY and its rail carrier subsidiaries are not obligated to pay such tax to the delivering supplier or to the Department. Such rulings are requested to be effective as of August 1, 1998, the commencement of the EETA.

### **Discussion**

#### **1. The Specific Terms of the Statute Require that COMPANY and its Subsidiaries be Excluded from the EETA Tax.**

Section 26 of the Electric Service Customer Choice and Rate Relief Law of 1997 (Public Act 90-561), the Act implementing the deregulation of the electric industry, repealed the tax imposed by section 2 of the Public Utilities Revenue Act and enacted in its place the EETA (35 ILCS 640/2-1 *et seq.*).

The EETA imposes a tax "on the privilege of using in this state electricity purchased for use or consumption and not for resale". 35 ILCS 640/2-4(a). Section 2-4(c) provides that the EETA tax "is not imposed . . . to the extent to which such transaction may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State." 35 ILCS 640/2-4(c).

The tax is collected by delivering suppliers by adding the tax to the "purchase price" of the electricity. 35 ILCS 640/2-7. However, in recognition that there are exempt purchasers of electricity, the definition of "purchase price" excludes:

[C]onsideration paid for . . . any purchase by a purchaser if the supplier is prohibited by federal or State constitution, treaty, convention, statute or court decision from recovering the related tax liability from such purchaser.

. . .

Section 2-3(d)(vii). Purchaser is defined as any person who, for valuable consideration, acquires electricity for use or consumption and not for resale. 35 ILCS 640/2-3(e).

These provisions place the incidence of the EETA tax on the consumption and use and, consequently, on the consumer/user of electricity, unless the privilege of consuming or using may not Constitutionally be subject to tax. In such case, the consumer/user is excluded from the tax and the supplier cannot add the tax to the excluded consumer/user's purchase price for electricity.

COMPANY and its rail carrier subsidiaries' federal tax exemption excludes them from the EETA tax. Section 24301(l) of the United States Code exempts COMPANY and its rail carrier subsidiaries from a "tax, fee, head charge or other charge, imposed or levied by a state". 49 U.S.C. § 24301(l). A federal law, therefore, prohibits the imposition of a state tax on COMPANY or its rail carrier subsidiaries. Thus, COMPANY and its rail carrier subsidiaries' consumption and use of electricity in Illinois is a transaction which, as recognized by section 2-4(c) of the EETA, "may not, under the Constitution and statutes of the United States, be made the subject of taxation" by Illinois. 35 ILCS 640/2-4(c).<sup>1</sup>

Additionally, sections 2-3(d)(vii) and 2-7 of the EETA, provide that the consideration paid by federally exempt entities, including the consideration paid by COMPANY and its rail carrier subsidiaries for electricity purchased in Illinois, cannot be burdened by the EETA tax. Accordingly, electricity suppliers cannot bill COMPANY and its rail carrier subsidiaries for the EETA tax on their utility bills.

Therefore, the sale of electricity to COMPANY and its rail carrier subsidiaries for use in Illinois is excluded from the tax imposed under the EETA.

## **2. The Supremacy Clause Excludes COMPANY and its Rail Carrier Subsidiaries from the EETA Tax.**

COMPANY and its rail carrier subsidiaries' exclusion from the tax imposed by the EETA is also mandated by the Supremacy Clause of the United States Constitution. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in the pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl.2.

A state taxing statute is unconstitutional and is preempted by the Supremacy Clause when a federal law prohibits a state tax on a protected entity or transaction. The United States Supreme Court has provided a test to determine preemption of state law:

In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the state to supplement it.

*Cipollone v Liggett Group, Inc., et al.*, 505 U.S. 504, 516; 112 S. Ct. 2608, 2617 (1992).<sup>2</sup>

The EETA, when tested against this standard, clearly conflicts with COMPANY's federal exemption from state taxes, fees and charges under 49 U.S.C. § 24301(l). That federal exemption has been liberally construed by federal courts to insure that Congress' intent in providing such exemption is fulfilled. See, e.g., *National Railroad Passenger Corporation v. New Castle County et al.*, 633 F. Supp. 354 (D. Del. 1986) (COMPANY is exempt from city and county real property taxes); *Dept. of Rev. and Tax. for Wyo. v. National Railroad Passenger Corporation*, 1982 U.S. Dist. LEXIS 17909 (Dec. 15, 1982, Case No. C 82-0320-B) (COMPANY is exempt from state personal property taxes).

Congress exempted COMPANY and its rail carrier subsidiaries from tax in 49 U.S. C. § 24301(l) to prevent the erosion of COMPANY's fiscal solvency. At a time when federal subsidies to COMPANY were increasing and COMPANY's profits decreasing, Congress found that "state and local taxes on a primarily Federal investment are inappropriate". H. Rpt. 97-81, 97<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1981); S. Rpt. 97-253, 97<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1981); *National Railroad Passenger Corp. v. PA Pub. Util. Com.*, 655 F. Supp.402, 404 (E.D. Pa. 1987); 848 F.2d 436, 437-38 (3d Cir. 1988) (hereinafter cited as *NRPC v. PA PUC*). Moreover, Congress believed it unreasonable for federal funds to be granted to COMPANY to be used to provide a tax windfall to States and localities; many parts of the country, Congress believed, would gladly pay an amount equal to local or state taxes owed by COMPANY in order to have the benefit of COMPANY service. S. Rpt. 516, 97<sup>th</sup> Cong. 2d Sess. (1982); *NRPC v. PA PUC*.

Under the terms of the statute and judicial interpretations thereof, section 24301(l) exempts COMPANY and its rail carrier subsidiaries from the EETA--a state tax which is levied directly on such entities for the privilege of using or consuming electricity in

Illinois. Thus, COMPANY and its rail carrier subsidiaries cannot be subject to the EETA.

The Illinois General Assembly, the body authorized by the Illinois Constitution as the exclusive branch of government with the power to raise revenue,<sup>3</sup> recognizes federal limitations, like COMPANY's federal exemption, on Illinois' power to tax. The General Assembly has provided:

It is the intent of the General Assembly that provisions in any Illinois tax statute that restrict application of the statute by stating substantially as follows:

"such taxes are not imposed with respect to any business in interstate commerce, or otherwise to the extent to which such business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State"

shall be construed to preclude taxation of only businesses not subject to taxation under the latest interpretation of the United States Constitution and statutes of the United States.

20 ILCS 2505/39c-2 (1998).

The General Assembly included the limitation in 20 ILCS 2505/39c-2 in the EETA in recognition that there are certain entities from whom the EETA may not be collected. COMPANY and its rail carrier subsidiaries are such entities.

Given the federal law exempting COMPANY and its rail carrier subsidiaries from all state taxes, fees, and charges, any attempt by Illinois to impose the EETA on such entities is preempted by federal law and, therefore, prohibited by the Supremacy Clause.

### 3. **Conclusion**

Application of the EETA by its own terms and in conjunction with the Supremacy Clause of the United States Constitution, makes it clear that the tax imposed by the EETA for the privilege of consuming or using electricity in Illinois cannot be imposed on COMPANY or its rail carrier subsidiaries.

No authorities contrary to those discussed herein have been located.

### **Procedural Statements**

Currently, the issue regarding COMPANY's exemption from the tax imposed by the EETA is not being examined in an audit of COMPANY or any of its rail carrier

subsidiaries nor is it directly addressed by pending litigation involving COMPANY, a rail carrier subsidiary or any related taxpayer. Moreover, there is no Illinois case law or regulations that are dispositive of the requested ruling.

To the best of the knowledge of COMPANY and its rail carrier subsidiaries, the Department has not previously ruled on the same or similar issue for COMPANY, its rail carrier subsidiaries, or a predecessor of either under the EETA. Further, to the best of the knowledge of COMPANY and its rail carrier subsidiaries neither it, its subsidiaries nor any representative of either have previously submitted the same or a similar issue to the Department under the EETA but withdrew it before a letter ruling was issued.

The Electricity Excise Tax Law, 35 ILCS 640/2-1 et seq. ("Act"), effective August 1, 1998, is imposed upon the privilege of using electricity in Illinois which is purchased for use or consumption and not for resale, other than by municipal corporations owning and operating a local transportation system for public service. The rates of the tax are specified in Section 2-4 of the Act.

The Act contains various exemptions. Section 2-4 (c) of the Act provides that the tax does not apply "with respect to any transaction in interstate commerce, or otherwise, to the extent to which such transaction may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State."

The provisions of 49 U.S.C.A. 24301(l) provide that

Amtrak or a rail carrier subsidiary of Amtrak is exempt from a tax or fee imposed by a State, a political subdivision of a State, or a local taxing authority and levied on it after September 30, 1981.

The legal incidence of the Electricity Excise Tax is upon users of electricity. Consequently, COMPANY as a user bears the incidence of this tax. However, the provisions of 45 U.S.C.A. 24301 (l) clearly exempt COMPANY and its rail carrier subsidiaries from taxes imposed and levied upon it by a State.

We believe that Section 2-4(c) of the Act authorizes an exemption from tax for COMPANY and its rail carrier subsidiaries. A statute of the United States, specifically the provisions of 45 U.S.C.A. 24301 (l), prevent the State of Illinois from taxing COMPANY and its rail carrier subsidiaries. Consequently, entities delivering electricity to COMPANY or its rail carrier subsidiaries are not required under Section 2-7 of the Act to collect tax from COMPANY or its rail carrier subsidiaries.

The facts upon which this ruling is based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope that this information is helpful. Should you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336, or visit our web cite at: <http://www.state.rev.il.us>.

Very truly yours,

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1. Indeed, the Department's collection of the EETA tax with respect to COMPANY and its rail carrier subsidiaries' purchases of electricity is preempted by the Supremacy Clause of the United States Constitution. See discussion below regarding application of the Supremacy Clause.
2. Federal Courts have applied preemption under *Cipollone* to protect COMPANY's federal rights. See *Union Center Redevelopment Corp. v. National Railroad Passenger Corp.*, 103 F.3d 62 (8<sup>th</sup> Cir. 1997) (state law may not be applied where it would frustrate the intent of a federal statute.)
3. Ill. Const. art. IX, sec. 1.